88-1558

Supreme Court, U.S.
FILED
MAR 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

No._____

IN THE

Supreme Court of the United States

October Term 1988

JACOBO ARMENTA,

Plaintiff-Appellee,

vs

HELEN LITTLE ARAGON, individually and as Personal Representative of the Estate of Maria S. Gonzales, Deceased.

Defendant-Appellant.

JURISDICTIONAL STATEMENT

CHARLES C. SPANN
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Counsel for Defendant / Appellant

QUESTIONS PRESENTED

1. Whether the due process clause of the Fourteenth Amendment to the United States Constitution is violated by a New Mexico statute that authorizes the filing of a claim against an estate without providing for service of the claim on the personal representative which results in the claim being validated because the personal representative fails to object to the claim within the period provided by another statute?

2. Whether the personal representative's failure to object to a claim against an estate within the period provided in a statute because of lack of notice of the claim can be valid as to heirs of the estate without violating the due process requirements of the Fourteenth Amendment?

PARTIES

All of the parties are named in the caption.

STATEMENT UNDER 28.4(c)

Since the proceeding draws into question the constitutionability of §45-3-804A, N.M.S.A., 1978, a state statute, and neither the State of New Mexico nor any agency, officer, or employee thereof is a party, it is noted that 28 U.S.C. §2403(b) may be applicable, and a copy of this statement is being served on the Attorney General of New Mexico.

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v. Joanne Pope, Executrix, 485 U.S. ____;
99 L Ed. 2d, 565; 108 S.Ct ____ 5,6

UNITED STATES CONSTITUTION

Fourteenth Amendment 1,2

STATUTES AND RULES

§45-3-804, N.M.S.A., 1978, Comp. 3

§45-3-804A, N.M.S.A., 1978, Comp. 1,2,6

§45-3-806, N.M.S.A., 1978, Comp. 3

§45-3-806A, N.M.S.A., 1978, Comp. 1,3,4,6

28 U.S.C. §1257(2) 2

IN THE

Supreme Court of the United States

October Term 1988

NO. .....

JACOBO ARMENTA,

Plaintiff Appellee,

vs.

HELEN LITTLE ARAGON, individually
and as Personal Representative of
the Estate of Maria S. Gonzales,
Deceased.

Defendant-Appellant.

ON APPEAL FROM THE SUPREME COURT OF NEW MEXICO

JURISDICTIONAL STATEMENT

Helen Little Aragon appeals from the final decision of the Supreme Court of New Mexico filed on November 21, 1988, which decision held that §45-3-804A, New Mexico Statutes Annotated (N.M.S.A.), 1978, Comp., providing for the filing of claims against an estate, was not unconstitutional under the Fourteenth Amendment of the United States Constitution even though there was no requirement that notice of the claim be served on the personal representative of the estate, as a result of which, the personal representative, without notice of the claim, did not object to the claim within the time provided by §45-3-806A, N.M.S.A., 1978, Comp.

OPINION BELOW

The Decision of the Supreme Court of New Mexico appears in Appendix A attached hereto. The decision also disposed of another civil appeal which had been consolidated with this probate cause and which is not in issue in the present appeal. The Order denying rehearing appears in Appendix B attached hereto. Neither the Decision nor the Order has been published in either the New Mexico Reports or the Pacific Reporter.

JURISDICTION

The decision of the Supreme Court of New Mexico, holding that §45-3-804A was not unconstitutional under the Fourteenth Amendment of the United States Constitution, was filed on November 21, 1988. A Petition for Rehearing was denied on December 19, 1988. A Notice of Appeal to the Supreme Court of the United States was filed on January 18, 1989. See Appendix C. This appeal is being docketed in this court within ninety days of the denial of rehearing below. Jurisdiction is invoked under 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment, United States Constitution:

All persons . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 45-3-804, N.M.S.A., 1978 Comp. (**Manner of presentation of Claims**), states:

> "Claims against a decedent's estate may be presented as follows:
>
> A. the claimant may deliver or mail to the personal representative a written statement of the claim indicating its basis, the name and address of the claimant and the amount claimed, or he may file a written statement of the claim with the district court. The claim is presented on the first to occur of receipt of the written statement of claim by the personal representative, or the filing of the claim with the district court. . . "

Section 45-3-806, N.M.S.A., 1978, Comp. (**Allowance of Claims**), states:

> "A. As to claims presented in the manner described in Section 3-804 [45-3-804 NMSA 1978] within the time limit prescribed in Section 3-803 [45-3-803 NMSA 1978], the personal representative may mail a notice to any claimant stating that the claim has been disallowed. . . Failure of the personal representative to mail notice to a claimant of action on his claim for sixty days after time for original presentation of the claim has expired has the effect of a notice of allowance. . ."

HOW THE FEDERAL QUESTION WAS RAISED

At a hearing before the State District Court, sitting in probate, on the validity of Appellee's claim raised by a Motion for Judgment on the Pleadings, the Appellant submitted authorities and argument contending that constitutional due process had been violated because Appellant had not been served with notice that the claim had been filed and, accordingly, could not object to the claim within the time provided in §45-3-806A, N.M.S.A., 1978; that, in addition, the heirs of the estate were parties to the probate proceedings, and a judgment validating the claim against the estate without notice to the heirs could not be entered without violating the heirs' right to due process.

The trial court entered judgment validating the claim, and the constitutional issues were raised again in a Motion for an Interlocutory Appeal to the Supreme Court of New Mexico. The due process claim was again raised before the New Mexico Supreme Court and rejected in its decision filed on November 21, 1988.

STATEMENT OF THE CASE

The Will of Maria S. Gonzales, deceased, was admitted to probate, and her niece, Helen Little Aragon, Appellant herein, was appointed personal representative by order entered on January 31, 1983. Notice to Creditors was published on February 18 and 25, 1983. On April 5, 1983, Jacobo Armenta, Appellee herein, filed a claim for fifty percent of the estate "based on agreements of Thomas Gonzales, Maria S. Gonzales and claimant." The claim was not served on the personal representative of the estate or her attorney and contains no certificate of service. The claim of Jacobo Armenta was discovered on October 8, 1986, by the personal representative, and a Notice of Disallowance and Motion to Strike was filed on October 17, 1986. On November 23, 1987, the Claimant filed a Motion for Judgment on the Pleadings, and a response was filed on November 30, 1987. After hearing, a Judgment granting Claimant's Motion was entered validating the claim on the grounds that the personal representative failed to mail a notice of rejection of the claim to the claimant within sixty days as required by §45-3-806A, N.M.S.A., 1978, even though the personal representative had no notice or knowledge of the filing of the claim. The claim which was validated was based on an oral agreement which was invalid under another section of the New Mexico Probate Code. It further was, by its terms, based on an agreement with the decedent's deceased husband which had been rejected in another action. The trial court's judgement was affirmed by the Supreme Court which held that a personal representative of an estate is required to

object to a claim within sixty days from the date it is filed even though the personal representative had no knowledge or notice of claim. As a result, the claim becomes valid against not only the personal representative but the heirs of the estate who also had no notice of the claim.

THE QUESTION IS SUBSTANTIAL

Previous decisions of the United States Supreme Court have held that the question of due process violation involving the deprivation of property rights under a state statute raises a question that is considered substantial. In *Tulsa Professional Collection Services, Inc., v. Joanne Pope, Executrix*, 485 U.S. ____; 99 L Ed. 2d 565; 108 S Ct. ____, the court considered a section of the Oklahoma Probate Code that required a creditor to present a claim to the executor within a specified time after publication of notice. The substantial question was whether this provision for notice solely by publication satisfied the due process clause. The case reviewed the prior opinions in *Mennonite v. Adams*, 462 U.S. 791 (1983), that held that actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party. Also, *Mullane v. Central Hanover Bank and Trust Company*, 339 U.S. 306 (1950), held that an "elementary and fundamental requirement of due process" in any final action is notice reasonably calculated to apprise an interested party of the pendency of the action and afford an opportunity to object.

The *Tulsa* decision referred to various claims that are protected property rights under due process. Surely the heirs' right to the assets of an estate after administration are protected from an invalid claim for fifty percent (50%) of the estate. Likewise, an executor's duties and obligations to administer the estate for the benefit of the heirs and other claimants is protected by due process from a state statute that

allows an invalid claim without notice to the executor. In *Tulsa* the Supreme court also held that, if a creditor of an estate was known or "reasonably ascertainable," then due process requires that notice by mail or other means that are as certain to insure actual notice is required, and notice by publication under the Oklahoma statute was insufficient.

In the present case we have no provision in the New Mexico statute for any notice at all to the personal representative or the heirs of the filing of a claim. A claim is "presented" when filed with the court under §45-3-804A, N.M.S.A. Section 45-3-806A states that failure of the personal representative to mail notice of disallowance for "sixty days after the time for original presentation of the claim has expired has the effect of notice of allowance." The New Mexico Supreme Court's November 21, 1988, decision holds that, under §45-3-806A, a personal representative must notify a claimant within sixty (60) days after a claim is filed with the court, or it is valid, notwithstanding the fact that the personal representative had no knowledge of the claim and no notice that the claim was filed. If it is a violation of due process for an executor of an estate to fail to furnish reasonable, actual notice by mail or other means to a claimant under *Tulsa*, then it likewise would violate due process for a claimant to fail to furnish reasonable, actual notice to an executor that he has filed a claim against the estate thereby permitting the personal representative to allow or disallow the claim. A state statute that fails to provide that a claimant furnish reasonable notice to a personal representative that a claim had been filed is unconstitutional under due process.

The *Tulsa* decision was furnished the New Mexico Supreme court by letter dated June 27, 1988. (See Appendix D.) Appellant felt, and still does, that it was decisive on the issue of due process that was before the New Mexico court in this case. The November 21, 1988, decision failed to discuss or even mention the *Tulsa* case in dealing with the due process

issue. Under these circumstances, it would seem appropriate for the Supreme court to hear this appeal and sumarily reverse the Supreme Court of New Mexico's decision.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

By: _____

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COUNSEL FOR APPELLANT

March 13, 1989

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

JACOBO ARMENTA,

Plaintiff-Appellant,

vs. No. 17,399

HELEN LITTLE ARAGON, Individually
and as Personal Representative
of the Estate of Maria S. Gonzales,
Deceased,

Plaintiff-Appellee.

APPEAL FROM THE DISTRICT COURT
OF BERNALILLO COUNTY

W. John Brennan, District Judge

JACOBO ARMENTA,

Plaintiff-Appellee,

vs. No. 17,650

HELEN LITTLE ARAGON, Individually
and as Personal Representative of
the Estate of Maria S. Gonzales,
Deceased,

Defendant-Appellant.

INTERLOCUTORY APPEAL FROM THE
DISTRICT COURT OF BERNALILLO COUNTY

W. John Brennan, District Judge

DECISION

STOWERS, JUSTICE

These consolidated appeals involve the estate of Maria S. Gonzales. Cause No. 17,399 (the civil case) involves an appeal by plaintiff-appellant, Jacobo Armenta, from the district court's order dismissing the case against defendant-appellee, Helen Aragon, individually and as personal representative of the estate of Maria S. Gonzales. Cause No. 17,650 is a probate matter and involves an interlocutory appeal from the district court's order granting plaintiff's motion for judgment on the pleadings against the estate of Maria S. Gonzales. Cause No. 17,650 was made an interlocutory appeal by order of the district court. We affirm both Cause No. 17,399 and the court's order in Cause No. 17,650. Because of the complexity of the pleadings and procedural history of these two cases, we will refer to the cause numbers throughout this decision.

Plaintiff claims that while his aunt and uncle, Maria and Tomas Gonzales, were living, he took care of them for approximately twenty years. Plaintiff further claims he entered into an agreement with them, and in exchange for his services and other valuable consideration, the Gonzaleses agreed to leave him one-half of their estate in their will. He maintains that this agreement was evidenced by their mutual wills. In the wills executed on July 19, 1978, Tomas and Maria bequeathed their estate in fee simple to the surviving spouse and named plaintiff and defendant residuary beneficiaries only if Tomas or Maria failed to survive each other. Tomas died on December 15, 1981. After his death his will was probated. Maria Gonzales filed Tomas' certificate of death and his will in the county clerk's office. The assets from the estate were transfered to Maria by operation of law. Thereafter, on June 9, 1982, Maria executed another will bequeathing the entire estate to defendant and naming defendant personal representative. Maria stated in her will that, after the death of Tomas,

she transferred certain funds to plaintiff, and thus, made no provision for him in her will. Maria Gonzales died January 3. 1983.

On January 31, 1983, Maria Gonzales' will was admitted to probate and defendant was appointed personal representative in the probate proceeding, Cause No. 17,650. A notice to the creditors was published on February 18 and 25, 1983. On April 5, 1983, plaintiff filed a claim in this matter against the estate of Maria S. Gonzales alleging that Maria breached her agreement with him to devise her property in consideration for services rendered. The claim, however, was never served on defendant, and the record contains no certificate of service.

In addition on May 3, 1983, and while the probate matter in Cause No. 17,399 was pending, plaintiff initiated a lawsuit against defendant, individually and as a personal representative of the estate of Maria Gonzales (Cause No. 17,399 the civil case) for declaratory judgement and a constructive trust. Plaintiff based this suit on the agreement he alleged he entered into with both Gonzaleses for one-half of their estate. Defendant moved for summary judgment claiming no writings had been signed by either Tomas or Maria Gonzales evidencing an agreement to devise real property to plaintiff. Thus, defendant stated if there was such an agreement, it had to be an oral one, and under NMSA 1978, Section 45-2-701, a contract to make a will can be established only by a writing. Moreover, plaintiff failed to file any proceedings to probate the estate of Tomas Gonzales or to appoint a personal representative for that estate. The trial court denied defendant's motion, and then, we denied plaintiff's interlocutory appeal on this issue. Subsequently on February 15, 1984 plaintiff filed a motion for appointment of Paul Jasler, Sr., as representative of the estate of Tomas Gonzales in Cause No. 17,399. The district court, in denying the motion, stated that under the New Mexico Probate Code such a petition could not precede an application to probate the estate. As a result of various

other motions filed, the district court consolidated the two cases. These cases, however, should not have been consolidated, since No. 17,399 is a civil case for declaratory judgment and imposition of a constructive trust and No. 17,650 is a probate matter. The consolidation has managed only to bring more confusion to these cases.

Thereafter in July 1986 defendant moved to dismiss Cause No. 17,399 or for summary judgment in that case claiming that a personal representative of the estate of Tomas Gonzales was an indispensable party, and the trial court lacked jurisdiction to proceed until one had been appointed. Then on October 8, 1986, defendant discovered plaintiff's probate claim against the estate of Maria S. Gonzales, which plaintiff had timely filed on April 5, 1983 in Cause No. 17,650. On October 17, 1986, defendant filed a notice of disallowance of and motion to strike plaintiff's claim on the ground that this claim was never properly served and was now time-barred pursuant to NMSA 1978, Sections 45-3-803 and 45-3-804. The court, on February 3, 1987, denied defendant's motion and granted plaintiff leave to file an amended complaint to name the estate of Tomas Gonzales as a party in Cause No. 17,399, within fifteen days after appointing a personal representative for that estate. Plaintiff filed a probate petition, Cause No. 87-179, to appoint this representative. On June 4, 1987, the trial court dismissed the probate petition (Cause No. 87-179), not at issue in this appeal, as untimely under NMSA 1978, Section 45-3-108 (A), and defendant has not appealed that decision.

On July 6, 1987, Helen Aragon, personal representative of the estate of Maria Gonzales, filed a motion to dismiss Cause No. 17,399 (the civil case). The district court, in granting the motion, stated that Armenta had failed to bring a probate proceeding to appoint a personal representative for the estate of Tomas Gonzales, an indispensable party, within three years from the date of the decedent's death, and his claim alleging an

agreement with Maria Gonzales for one-half of her estate is the proper subject matter in a probate proceeding. From the dismissal of Cause No. 17,399 (the civil case), plaintiff appeals to this court.

Subsequently on November 23, 1987, plaintiff filed a motion for judgment on the pleadings, SCRA 1986, 1-012(C), in Cause No. 17,650, the probate case. After a hearing the trial court granted the motion stating that plaintiff's claim filed on April 5, 1983, against the estate of Maria Gonzales was not timely disallowed by defendant. Defendant appeals this order, which has been made an interlocutory appeal.

1. *Cause No. 17,399 (The Civil Case).*

We affirm the district court's dismissal of Cause No. 17,399. This action did not comply with the three-year time-limitation provision in the Probate Code, NMSA 1978, Section 45-3-108(A).

In his complaint in Cause No. 17,399, plaintiff claimed he entered into a contract with Tomas Gonzales who agreed to bequeath one-half of his estate to plaintiff in return for companionship, emotional support and other consideration, and that Maria Gonzales had ratified this agreement. Because this case involves a will contest based on a contract allegedly entered into with Maria and Tomas Gonzales and plaintiff, a personal representative of the estate of Tomas Gonzales is an indispensable party to enforce the agreement. Since no such representative was made a party to this action, the trial court did not err in dismissing the case.

> There is a general rule that all persons, whose interests will necessarily be affected by any decree . . . [in] a given case, are necessary and indispensable parties, and the court will not proceed to a decree without them. Where such necessary parties cannot . . . be brought before the court, there is nothing to be done except to dismiss the bill, for the suit is inherently defective . . . .

C. de Baca v. Baca, 73 N.M. 387, 394, 388 P.2d 392, 397 (1964) (quoting *American Trust and Savings Bank of Albuquerque v. Scobee*, 29 N.M. 436, 453, 224 P.2d 788, 790 (1924)).

NMSA 1978, Section 45-3-108 (A) of the Probate Code states in relevant part: "No informal probate or appointment proceeding or formal testacy or appointment proceeding . . . may be commenced more than three years after the decedent's death." A proceeding to appoint a personal representative has to be brought within three years from the decedent's date of death. Plaintiff failed to probate the estate of Tomas Gonzales, appoint a representative as required within three years from Gonzales' death, and join the personal representative as a party in this action.

Instead, plaintiff proceeded by filing a motion to appoint a representative for Tomas Gonzales' estate in a civil suit for a declaratory judgment and imposition of a constructive trust against defendant, individually and as personal representative of the estate of Maria Gonzales. This motion was properly denied. Had plaintiff, however, initiated a probate proceeding to appoint a representative immediately after the trial court denied this motion on July 19, 1984, he would have still been able to timely file within the three-year limitation provision from Tomas Gonzales' death on December 15, 1981. Plaintiff waited until 1987, more than three years after Tomas had died, to commence probate proceedings to appoint a personal representative of that estate. That action was correctly dismissed.

Aside from failing to comply with the Probate Code, plaintiff's claim for the estate or its real property is premised on an oral agreement with Maria and Tomas Gonzales. Under Section 45-2-701, an agreement to devise real property in a will can only be established by a writing. Furthermore, the mere making of a will is not sufficient evidence of a contract to devise or bequeath property without specific reference to all of the essential terms of the contract. *In re Estate of Vin-*

cioni, 102 N.M. 576, 582, 698 P.2d 446, 452 (Ct. App.), *cert. denied*, 102 N.M. 613, 698 P.2d 886 (1985). In this case there was no writing to evidence the existence of a contract between plaintiff and the Gonzaleses nor sufficient evidence from which to infer that a valid contract existed within the four corners of their wills.

2. *Cause No. 17,650 (The Probate Case).*

Plaintiff on April 5, 1983, in Cause No. 17,650, a probate matter, filed a claim against the estate of Maria Gonzales alleging a one-half share of her estate. Specifically plaintiff stated, "[t]his claim is based upon the agreements of Tomas Gonzales, Maria S. Gonzales and [plaintiff], that [plaintiff] would be willed such amount in exchange for services performed and other valuable consideration for a period of over twenty (20) years." Not until October 17, 1986, did defendant file a notice of disallowance of and motion to strike plaintiff's claim. Defendant argued that there was no service of this claim and it was now time-barred.

In the probate case, plaintiff timely filed his claim against the estate in the appropriate court within two months after the date of the first publication of notice to creditors. NMSA 1978, § 45-3-803 (A)(1). This was proper service of the claim. Section 45-3-804 (A) provides that a claim is presented when filed with the appropriate court. Thereafter, the burden is on the personal representative to mail a notice of action on this claim to plaintiff within sixty days. Failure of the personal representative to do so has the effect of allowing this claim to proceed. NMSA 1978, § 45-3-806 (A).

Subsequently, the district court granted plaintiff's motion for judgment on the pleadings because defendant did not timely file a notice of disallowance. The court also stated that its ruling on defendant's motion to dismiss in Cause No. 17,399 was based on a contract with Tomas Gonzales, while Cause No. 17,650 was based on a contract with Maria Gonzales.

Defendant, on appeal, argues that the order entered on

September 8, 1987, in Cause No. 17,399 dismissing that case is res judicata of the validity of plaintiff's claim in Cause No. 17,650. We do not agree. Res judicata is inapplicable because plaintiff's cause of action in Cause No. 17,399 is not the same cause of action as in Cause No. 17,650. In 17,399 Tomas Gonzales was an indispensable party to plaintiff's claim that Tomas was bound by an agreement to leave one-half of his estate to him upon the death of Tomas. On the other hand, No. 17,650 is a probate claim against the estate of Maria Gonzales that alleges that she breached her agreement with plaintiff in failing to devise one-half of her property in consideration for services rendered. The fact that some portion of the property in Maria's estate may have come to her through the death of Tomas does not make his estate an interested party to her testamentary disposition.

The issue in Cause No. 17,650 (the probate case) is whether a due process violation occurred when the personal representative of Maria's estate was not personally notified of plaintiff's claim. It is the reasonableness of the notice requirement in Section 45-3-804(A) which we must examine. The personal representative initiates the abbreviated time schedule for the presentation of claims by publishing constructive notice to creditors. NMSA 1978, §45-3-801. Creditors have sixty days after the date of first publication of notice in which to file a claim against the estate. NMSA 1978, §45-3-803(A)(1). A creditor can notify the estate of a claim either by delivering or mailing to the personal representative a written statement of the claim, or he may file a written statement of the claim with the appropriate court. NMSA 1978, §45-3-804(A). Claims against the estate, if not timely filed, are barred as a matter of law. *Corlette v. Smith*, 106 N.M. 207, 210, 740 P.2d 1191, 1194 (Ct. App.), *cert. denied*, 106 N.M. 174, 740 P.2d 1158 (1987). However, if action is to be taken on a claimant's or creditor's claim, the personal representative must notify the claimant within sixty days after the time

permitted for presentation of claims or the claim is allowed. NMSA 1978 §45-3-806(A). Because the personal representative initiates this process, it does not seem unreasonable to make it incumbent upon the personal representative to follow up and check the court file after the last day for presentation of claims has elapsed. The personal representative is then given an additional sixty days in which to determine which claims will be allowed and which will be dissallowed, and to notify the claimant that action will be taken. After that time, as a matter of law, creditors who have not been notified have a valid claim against the estate.

Defendant's notice of disallowance filed on October 17, 1986, exceeded the sixty-day rule, and in effect was a notice of allowance. Therefore, any defenses against plaintiff's claim are inapplicable because, by defendant's inaction, she has allowed the claim against the estate.

We affirm the judgment of the district court in Cause No. 17,399 and in Cause No. 17,650. Each party shall bear his or her own costs and attorney fees.

IT IS SO ORDERED.

/s/
HARRY E. STOWERS, JR., Justice

WE CONCUR:

/s/
TONY SCARBOROUGH, Chief Justice

/s/
DAN SOSA JR., Senior Justice

/s/
RICHARD E. RANSOM, Justice

/s/
HARVEY B. FRUMAN,
COURT OF APPEALS JUDGE

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

Monday, December 19, 1988

NO. 17,399/17,650

JACOBO ARMENTA,

Plaintiff-Appellant,

vs.

HELEN LITTLE ARAGON, Individually and as Personal Representative of the Estate of Maria S. Gonzales, Deceased,

Plaintiff-Appellee.

JACOBO ARMENTA,

Plaintiff-Appellee,

vs.

HELEN LITTLE ARAGON, Individually and as Personal Representative of the Estate of Maria S. Gonzales, Deceased,

Plaintiff-Appellant.

This matter coming on for consideration by the Court upon Motion for rehearing, and the Court having considered said motion and being sufficiently advised;

NOW THEREFORE, IT IS ORDERED, that the Motion for rehearing is hereby denied.

ATTEST: A True Copy

ROSE MARIE ALDERETTE
CLERK OF THE SUPREME COURT

By /s/

Deputy

APPENDIX C

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

JACOBO ARMENTA,

Plaintiff-Appellee,

vs. No. 17,650

HELEN LITTLE ARAGON,

Defendant-Appellant.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Helen Little Aragon, Defendant/Appellant in the captioned cause, hereby appeals to the Supreme Court of the United States from the final decision of the Supreme Court of New Mexico entered in said cause on November 21, 1988, and from the order denying Appellant's Motion for Rehearing entered on the 19th day of December, 1988. This appeal is taken pursuant to T. 28 U.S.C. § 1257(2)

The Supreme Court of New Mexico is in possession of the record in the cause.

Original Signed by
CHARLES C. SPANN

Charles C. Spann
Attorney for Defendant/Appellant
P.O. Box 1031
Albuquerque, NM 87103
Tele.: (505) 243-3525

The undesigned hereby certifies that a copy of the foregoing was served by placing a copy of same in the mail to Narciso Garcia,
810 Charleston, N.E., • Albuquerque, NM 87110,
This 18th day of January, 1989.

Original Signed by
CHARLES C. SPANN

CHARLES C. SPANN

APPENDIX D

LAW OFFICES

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ANN WILCOX HOOD
OF COUNSEL

June 27, 1988

Rose Marie Alderete, Clerk
New Mexico State Supreme Court
P.O. Box 848
Santa Fe, NM 87504-0848

Re: **In the Matter of the Estate of Maria S. Gonzales**
No. 17,650

Dear Ms. Alderete:

Reference is made to Appellant's Brief-in-Chief in the captioned case, and specifically Point 2, which contends that the failure to serve notice of Appellee's claim to the personal representative would violate the due process clause of the New Mexico and U. S. Constitutions. I have just discovered that an opinion of the U. S. Supreme Court, decided April 19, 1988, dealt with the question of due process insofar as publication of notice to creditors is concerned under a provision of the Uniform Probate Code which has been adopted in New Mexico. The case is *Tulsa Professional Collection Services, Inc., vs. Pope*, No. 86-1961, and was reported in The United States Law Week on April 19, 1988. I enclose a copy of the opinion and would request that it be made part of our Brief-in-Chief.

You will note that the Court held that "actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable." (Citing *Mennonite Board of Missions vs. Adams*, 462 U. S. 791 (1983).) If a creditor whose name and address is known or reasonably ascertainable must receive actual notice of the appointment of the personal representative and file his claim in addition to publication, then it follows that a personal representative must be furnished notice of a claim that is filed before it can result in the claim being allowed and the heirs deprived of property without due process, which is the result of the Trial Court's holding in the captioned appeal.

Respectfully yours,

/s/
Charles C. Spann

CCS:cs/14L.9
Enclosure
cc: Narciso Garcia, Jr.,

Supreme Court, U.S.
FILED
APR 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1558

IN THE

Supreme Court of the United States

October Term 1988

JACOBO ARMENTA,

Plaintiff-Appellee,

vs

HELEN LITTLE ARAGON, individually and as Personal Representative of the Estate of Maria S. Gonzales, Deceased.

Defendant-Appellant.

MOTION TO DISMISS

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IN THE

Supreme Court of the United States

October Term 1988

No. 88-1558

JACOBO ARMENTA,

Plaintiff Appellee,

vs.

HELEN LITTLE ARAGON, individually and as Personal Representative of the Estate of Maria S. Gonzales, Deceased.

Defendant-Appellant.

ON APPEAL FROM THE SUPREME COURT OF NEW MEXICO

MOTION TO DISMISS

Jacobo Armenta hereby moves this Honorable Court to dismiss the appeal of Helen Little Aragon from the final decision of the Supreme Court of New Mexico. Armenta contends the appeal is not within this Court's jurisdiction and does not present a substantial federal question.

OPINION BELOW

The Decision of the Supreme Court of New Mexico is not published in the New Mexico Reports or the Pacific Reporter. The Decision appears as Appendix A to Appellant's Jurisdictional Statement.

JURISDICTION

Appellant invokes the jurisdiction of this Court under 28 U.S.C. 1254(2). Appellee challenges the Jurisdictional Statement.

STATEMENT OF THE CASE

Aragon challenges the provision of Section 45-3-804, N.M.S.A., (1978 Comp.) which allows the filing of claims with the district court as being violative of due process under the Fourteenth Amendment to the United States Constitution. Section 45-3-804, N.M.S.A., (1978 Comp.) provides in part:

> "Claims against a decedent's estate may be presented as follows:
>
> A. the claimant may deliver or mail to the personal representative a written statement of the claim indicating its basis, the name and address of the claimant and the amount claimed, or he may file a written statement of the claim with the district court. The claim is presented on the first to occur of receipt of the written statement of claim by the personal representative, or the filing of the claim with the district court."

Aragon contends the filing of claims with the district court violates due process because she, as personal representative, had not been served with notice and because the heirs to the estate have not been served with notice.

Jacobo Armenta's claim is based upon his agreement with his aunt (Maria Gonzales) and uncle (Tomas Gonzales) that Armenta would take care of them while living and that they would leave him one-half of their estate. The other one-half of the estate was to be left to his cousin, Helen Little Aragon, the Appellant here. Wills were executed by both on July 19, 1978, whereby Tomas and Maria bequeathed their estate to the surviving spouse and named Armenta and Aragon residuary beneficiaries if Tomas or Maria failed to survive each other. After Tomas' death on December 15, 1981, his will was

probated by the filing of a certificate of death and the will with the county clerk's office. On June 2, 1982, Maria executed another will bequeathing the entire estate to Helen Little Aragon and naming her personal representative. Armenta was not aware of the existence of the second will until after probate of Maria's estate was commenced. Maria passed away on January 3, 1983, and on January 31, 1983, Helen Little Aragon was appointed personal representative pursuant to the probate petition she filed. On February 18 and 25, 1983, Aragon published a notice to creditors. A copy of the Affidavit of Publication is provided herewith as Appendix 1. The notice states in part:

> Claims must be presented either to the undersigned personal representative at 232 Conchas N.E., Albuquerque, New Mexico 87123, or filed with the District Court of Bernalillo County, county courthouse, Albuquerque, New Mexico 87102.
>
> Dated: 2/10/83
>
> /s/
> Helen Little Aragon

Even though she was aware of Armenta's claim to one-half the estate she did not serve Armenta with notice. Armenta became aware of the publication and timely filed his claim on April 5, 1983, in the district court pursuant to the published notice.

Additionally, on May 3, 1983, Armenta filed a civil suit against Aragon both in her individual capacity and as personal representative of the estate of Maria Gonzales. The history of that case is discussed in the New Mexico Supreme Court Decision which is Appendix A to the Jurisdictional Statement.

It was not until October 8, 1986, that Aragon mailed a Notice of Disallowance to Armenta. Aragon failed to comply with the sixty (60) day time limit imposed by Section 45-3-804

(C) and Section 45-3-806 (A), N.M.S.A. (1978 Comp.). Due to the statutory allowance of the claim Armenta's motion for judgment on the pleadings was granted. The Judgment was upheld on appeal to the New Mexico Supreme Court.

ARGUMENT

I The Appeal is not within this Court's Jurisdiction

Aragon presents two questions on appeal. The first is whether a due process violation occurred when the personal representative of Maria's estate was not personally notified of Armenta's claim. This question was addressed and decided by the New Mexico Supreme Court. The second question is whether the personal representative's failure to object to the claim is valid as to the heirs of the estate. This question was not addressed and decided by the New Mexico Supreme Court.

Aragon contends the second question was raised and decided on her appeal to the New Mexico Supreme Court. A review of the Decision reveals no such issue being decided by New Mexico's highest court. Because the New Mexico Supreme Court did not pass on such issue this part of the appeal is not within this Court's jurisdiction under 28 U.S.C. Section 1257(2). *Peralta v. Heights Medical Center, Inc.*, 485 U.S. ——, ——, n.4, 108 S.Ct. 896, 898, n.4, 99 L.Ed 2d 75, 80, n.4 (1988); *Miss. Power & Light v. Miss. Ex. Rel Moore*, 108 S.Ct. 2428, 2437 n.10, 101 L.Ed 2d 322 (1988). *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 2321, 76 L.Ed 2d 527 (1983).

Aragon's attempt to raise the rights of the heirs to the estate is also not within this Court's jurisdiction to the extent she is attempting to raise the rights of third parties. One cannot invoke appellate jurisdiction of United States Supreme Court to vindicate rights of third parties. *Hanson v.*

Denckla, 357 U.S. 235, 2 L.Ed 2d 1283, 78 S.Ct. 1228 (1958). Maria's second will bequeathed the entire estate to Helen Little Aragon. She appears to be the only heir to the estate. Any other heirs have not been identified and her appeal on behalf of any other heir is not within this court's jurisdiction under 28 U.S.C. Section 1257(2).

Additionally, Aragon's appeal is taken in her capacity as personal representative of the estate of Maria Gonzales. The Notice of Appeal does not designate the capacity in which she appeals. However, the only capacity in which she was a party to the probate proceeding was that of personal representative. Thus, her appeal can only be in her status as personal representative. As personal representative she does not suffer any deprivation under the New Mexico Supreme Court Decision nor is the Decision personal to her as personal representative. To confer this Court with jurisdiction she must show that enforcement of the Decision will deprive her, as distinguished from others, of some right arising under the constitution. *Liberty Warehouse Co. v. Burley Tobacco Growers' Cooperative Marketing Assoc.*, 276 U.S. 71, 72 L.Ed 473, 48 S.Ct. 291 (1928). The party raising the question of constitutionality and invoking the jurisdiction of the Supreme Court must be interested in, and affected adversely by the decision of the state court sustaining the act, and her interest must be of a personal, and not of an official nature. *Braxton County Court v. West Virginia*, 208 U.S. 192, 52 L.Ed 450, 28 S.Ct. 275 (1908). The right of Aragon is limited to an inquiry whether the statute is so applied as to deprive her as personal representative of property without due process of law. *Castillo v. McConnico*, 168 U.S. 674, 42 L.Ed 622, 18 S.Ct. 229 (1898).

Thus, Aragon's appeal is not within this Court's jurisdiction under 28 U.S.C. Section 1257(2) in that (1) the second question raised by her was not decided by New Mexico's highest court; (2) Aragon may not raise the rights of third

parties; (3) and because Aragon, as personal representative, is not affected adversely by the decision.

II. The Appeal Does not Present a Substantial Federal Question

A. Appellant's Argument on Behalf of the Heirs is Not Personal to Her. Appellant's Argument as Personal Representative Is of an *Official* Nature.

Aragon contends the questions are substantial because "the heirs' rights to the assets of an estate after administration are protected from an invalid claim for fifty-percent (50%) of the estate" and that "an executor's duties and obligations to administer the estate for the benefit of the heirs and other claimants is protected by due process from a state statute that allows an invalid claim without notice to the executor". Jurisdictional Statement, p. 5-6.

The heirs rights to the assets of the estate have not been argued to the New Mexico Supreme Court and have not been addressed by such court. Armenta has challenged the attempt to argue the heirs rights under the jurisdictional challenge. Aragon next argues that as personal representative she has duties and obligations to administer the estate and that these duties and obligations are protected by due process. The Fourteenth Amendment provision upon which Aragon relies states: "nor shall any state deprive any person of life, liberty, or property without due process of law". The duties and obligations of Aragon as personal representative are not property rights protected under the due process clause.

B. Notice to The Personal Representative Through a Procedure Instituted by Her Was Reasonable.

On April 5, 1983, Armenta filed his claim with the district court clerk. The trial court had jurisdiction to allow the claim against the estate, where the claim was filed in the district

court after the personal representative published notice. *Matter of Estate of Bergman*, 107 N.M. 574, 761 P.2d 452 (Ct.App. 1988).

Armenta contends Aragon has not raised a substantial federal question in that the procedure initiated by the personal representative was followed by Armenta and the filing of the claim with the district court clerk was reasonable.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated. under the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections." *Tulsa Professional Collection Services, Inc. v. Joanne Pope, Executrix*, 485 U.S. ____; 99 L.Ed 2d 565; 108 S.Ct. ____ (1988). *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314, 94 L.Ed 865, 70 S.Ct. 652 (1950). To meet the requirements of due process, the notice must be reasonable and adequate for the purpose, due regard being had to the nature of the proceedings and the character of the rights which may be affected by it. *Dohany v. Rogers*, 281 U.S. 362, 74 L.Ed 904, 50 S.Ct. 249; *Missouri ex rel. Hurwitz v. North*, 271 U.S. 40, 70 L.Ed 818, 46 S.Ct. 384 (1926); *Standard Oil Co. v. Missouri*, 224 U.S. 270, 56 L.Ed 760, 32 S.Ct. (1912). Due process does not guarantee or prescribe any particular form of notice; the notice required will vary with the circumstances and conditions. *Walker v. City of Hutchinson*, 352 U.S. 112, 1 L.Ed 2d 178, 77 S.Ct. 200 (1956). Actual personal notice is not necessary in all proceedings. There may be, and must be, some form of constructive or substituted service. *Jacob v. Roberts*, 223 U.S. 261, 56 L.Ed 429, 32 S.Ct. 303 (1912); *Ballard v. Hunter*, 204 U.S. 241, 51 L.Ed 461, 27 S.Ct. 261 (1907).

New Mexico's "nonclaim statute" being challenged by Appellant is derived from Section 3-804 of the Uniform Probate Code which provides in part:

> Claims against a decedent's estate may be presented as follows:
>
> (1) The claimant may deliver or mail to the personal representative a written statement of the claim indicating its basis, the name and address of the claimant, and the amount claimed, or may file a written statement of the claim, in the form prescribed by rule, with the clerk of the court.

Uniform Probate Code, Section 3-804, 8 U.L.A. 361 (1983).

The personal representative has the duty to investigate each claim and to use reasonable care in determining whether to allow or disallow it. Basic Probate in New Mexico, Bozarth, et al. (1988) p. 72. Failure to act on a claim has the effect of allowing the claim. Section 45-3-806 (A).

Here, Aragon published notice that claims were to be presented to her or filed in the district court. This procedure was followed by Armenta. Aragon failed to review the court file after the expiration of the filing deadline. Judgment on the pleadings was entered due to her neglect. She now complains that the procedure she initiated violated her due process rights. Under the circumstances of this case filing the claim with the district court was reasonable.

CONCLUSION

For the foregoing reasons, Armenta prays that the appeal be dismissed.

Respectfully submitted,

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By: _____
NARCISO GARCIA, JR.
Attorney for Plaintiff-Appellee

April 10, 1989

APPENDIX 1

AFFIDAVIT OF PUBLICATION

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
IN THE DISTRICT COURT
PB. 83-008

IN THE MATTER OF THE ESTATE OF MARIA S. GONZALES, deceased.

NOTICE TO CREDITORS

NOTICE IS HEREBY GIVEN that the undersigned has been appointed personal representative of this estate. All persons having claims against this estate are required to present their claims within two months after the date of the first publication of this Notice or the claims will be forever barred. Claims must be presented either to the undersigned personal representative at 232 Conchas, N.E., Albuquerque, New Mexico 87123, or filed with the District Court of Bernalillo County, County Courthouse, Albuquerque, New Mexico 87102.

DATED 2/10/83

/s/ Helen Little Aragon
HELEN LITTLE ARAGON
232 Conchas, N.E.
Albuquerque, New Mexico 87123
PERSONAL REPRESENTATIVE

SPANN, LATIMER & HOLLOWWA
By: Charles C. Spann
914 First Interstate Bank Building
P.O. Box 1031
Albuquerque, New Mexico 87103
Telephone (505) 243-3525
HCS Feb. 18, 25, 1983

Health City Sun

Office: 900 Park Ave., S.W. - Dial 242-3010
Mail Address: P. O. Box 1517
Albuquerque, New Mexico 87103

State of New Mexico }
County of Bernalillo } ss.

Joan L. Crawford, being duly sworn declares and says she is the publisher of the Health City Sun, a weekly newspaper published and having a general paid circulation in the city of Albuquerque, County of Bernalillo, and State of New Mexico; that the said Health City Sun was entered in the post office at Albuquerque as second class mail matter on September 5, 1930, and has met all requirements of a legal newspaper under the laws of the State of New Mexico.

Affiant further states that this newspaper is duly qualified to publish Legal Notices or advertisements within the meaning of Section 14-11-4 of the New Mexico Statutes annotated (1978).

Affiant further states that the publication, a copy of which is hereto attached, was published in said paper in the regular and entire issue of each number of the paper, during the period and time of publication, and that the notice was published in the news paper proper and not in a supplement thereof for 2 weeks, the first publication being on the 18th day of February, 1983, and the last publication being in the issue of the 25th day of February, 1983.

Affiant further states that the costs of publishing said legal notice have been paid, or have been assessed as court costs in the case numbered.

Joan L. Crawford

Subscribed and sworn to before me, a Notary Public in and for said County and State, this 25th day of February, 1983.

Notary Public

My Commission expires 11/16/83